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No. 90-1362

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE WILSON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

Section 19 of the National Labor Relations Act, 29 U.S.C. 169, provides that "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment," but "may be required * * * in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund."

The questions presented are:

1. Whether the National Labor Relations Board correctly concluded that Section 19 cannot properly be interpreted to apply to an employee whose religious objection to joining or supporting unions is based on a personal, sincerely held religious belief, rather than on membership in and adherence to the established tenets of a "bona fide religion, body, or sect."

2. Whether Section 19, if so construed, violates the Establishment Clause of the First Amendment.

3. Whether, if Section 19 were found to be unconstitutional, the provision should be nullified, rather than extended to all employees having a religious objection to joining or supporting unions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Arvin Industries, 285 N.L.R.B. 753 (1987)	16
Ashwander v. *TVA*, 297 U.S. 288 (1936)	15
Board of License Comm'rs v. *Pastore*, 469 U.S. 238 (1985)	13
Burns v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)	16
CFTC v. *Schor*, 478 U.S. 833 (1986)	12
Communications Workers v. *Beck*, 487 U.S. 735 (1988)	11, 12
Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987)	5
Crowell v. *Benson*, 285 U.S. 22 (1932)	4
Edward J. DeBartolo Corp. v. *NLRB*, 463 U.S. 147 (1983)	3-4
EEOC v. *University of Detroit*, 904 F.2d 331 (6th Cir. 1990)	16
Fusari v. *Steinberg*, 419 U.S. 379 (1975)	13
International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961)	11
International Ass'n of Machinists, Lodge 751 v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988)	11, 13
Larson v. *Valente*, 456 U.S. 228 (1982)	4, 5, 15, 16
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	5

Cases—Continued: Page

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 16
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979).. 12
NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963) 3
NLRB v. *Mexia Textile Mills Inc.*, 339 U.S. 563 (1950) 14
NLRB v. *Raytheon Corp.*, 398 U.S. 25 (1970) .. 14
Nottelson v. *Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981) 16
Tooley v. *Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) 16
United States v. *Rumely*, 345 U.S. 41 (1953) ... 12
Welsh v. *United States*, 398 U.S. 333 (1970) 8, 12

Constitution, statues and regulation:

U.S. Const. Amend. I:
Establishment Clause 4, 7
Free Exercise Clause 6
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
§ 701(j), 42 U.S.C. 2000e(j) 4, 10, 16
§ 703(a), 42 U.S.C. 2000e-2(a) 10
§ 703(c), 42 U.S.C. 2000e-2(c) 10
National Labor Relations Board Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2
§ 8(b)(2), 29 U.S.C. 158(b)(2) 2, 14
§ 16, 29 U.S.C. 166 6
§ 19, 29 U.S.C. 169 ..... *passim*
National Labor Relations Act Amendments, 1974, Pub. L. No. 93-360, § 3, 88 Stat. 397 7-8
National Labor Relations Act Amendments, 1980, Pub. L. No. 96-593, 94 Stat. 3452 10
29 C.F.R. 1605.2(d)(2) 13

Miscellaneous: Page

120 Cong. Rec. (1974):
p. 12,536 9
p. 12,950 8
p. 12,968 8
pp. 13,535-13,543 8
p. 13,536 .....
p. 13,539 8
pp. 16,902-16,903 9
p. 16,914 9
p. 16,915 9
pp. 16,915-16,916 9
126 Cong. Rec. (1980):
p. 2580 10
p. 2581 11
pp. 2581-2582 11
p. 2582 11
p. 2583 10
p. 2584 ..... 10, 11
H.R. Rep. No. 1175, 93d Cong., 2d Sess. (1974) 9
H.R. Rep. No. 496, 96th Cong., 1st Sess. (1979) 10, 11
Staff of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974* (Comm. Print 1974) 8, 9
S. Rep. No. 988, 93d Cong., 2d Sess. (1974) ... 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 920 F.2d 1282. The opinion of the National Labor Relations Board (Pet. App. 13a-21a) is reported at 293 N.L.R.B. No. 62.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1990. The petition for a writ of certiorari was filed on February 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Grand Rapids City Coach Lines, Inc. (the Company) and Local 836, Amalgamated Transit Union (the Union) were parties to a collective-bargaining agreement that required employees to become "members of the Union" by tendering dues and initiation fees. Pet. App. 17a. The Union asked petitioner, a Company employee, to sign a card authorizing the Company to deduct union dues and initiation fees from his wages and forward the money to the Union. Petitioner refused to sign the authorization card, citing his personal religious belief against joining a union or paying its dues. *Id.* at 17a-20a.

The Union made a request to the Company to discharge petitioner for his failure to pay union dues and initiation fees. Pet. App. 17a-18a. The Company refused to do so, and filed an unfair labor practice charge against the Union. *Id.* at 18a. The National Labor Relations Board's General Counsel issued a complaint, alleging that petitioner's refusal to pay union dues and fees was protected by Section 19 of the Act, 29 U.S.C. 169, and that the Union had violated Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2), by requesting petitioner's discharge. Pet. App. 16a-18a.[1]

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[1] The unfair labor practice complaint rested on the interrelationship of three provisions of the Act – Section 8(b)(2), Section 8(a)(3), and Section 19.

Section 8(b)(2), 29 U.S.C. 158(b)(2), prohibits a union from "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee in violation of" Section 8(a)(3).

Section 8(a)(3), 29 U.S.C. 158(a)(3), prohibits employer discrimination based on union membership or lack of membership. The first proviso to Section 8(a)(3), however, creates a limited exception for union security agreements. It permits an agreement between a union and an employer requiring, "as a condition of employment[,] membership [in the union] on or after the thirtieth day following the beginning of such employment" (29 U.S.C. 158(a)(3)); "the burdens of membership upon

2. The Board, affirming the decision of an administrative law judge, dismissed the unfair labor practice complaint. It concluded that petitioner was not within the scope of Section 19 because he had not shown that he was a member of a bona fide religion, body or sect which historically held conscientious objections to joining or supporting labor organizations, as required by the express language of Section 19. Pet. App. 13a-14a, 18a, 20a-21a. In concurrence, Chairman Stephens observed that the Board did not need to address "any possible constitutional problems." *Id.* at 14a n.1. He noted that, "[w]hile the Board is obligated to construe legislation in a manner that will avoid constitutional questions," the Board was not "free to adopt constructions that are not "fairly possible.' " *Ibid.* (quoting *Edward J.*

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which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

Section 19, 29 U.S.C. 169, in turn, creates an exemption from the obligation imposed by a union security agreement. It provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

DeBartolo Corp. v. NLRB, 463 U.S. 147, 157 (1983) and *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

3. Petitioner sought review of the Board's order dismissing the unfair labor practice complaint. He contended that Section 19, as construed by the Board, violated the Religion Clauses of the First Amendment, and that the Board erred in failing to adopt a broader construction that would have read the "membership" requirement out of Section 19 and thus cured any constitutional defect. Pet. App. 3a-4a.

The court of appeals agreed with the Board that petitioner "does not qualify for the religious objectors' exemption under a literal reading of section 19." Pet. App. 4a. The court also agreed that it was not "fairly possible" to construe Section 19 to eliminate the "membership" requirement and thereby make it applicable to all employees with religious objections to joining or supporting unions, regardless of whether the employees are members of a religion, body or sect which has historically held conscientious objections. *Id.* at 10a.[2] The court concluded, however, that Section 19, as so construed, violates the Establishment Clause. Pet. App. 6a-9a, 12a.

The court first stated that *Larson* v. *Valente*, 456 U.S. 228 (1982), "indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)]." Pet.

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[2] The court observed that the coverage of Section 19 is not as broad as the coverage of Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S. 2000e(j). Section 701(j) protects "all aspects of religious observance and practice, as well as belief," regardless of membership in a religion, body, or sect. Pet. App. 5a. The court noted that Title VII has been interpreted to require unions and employers to accommodate an employee's religious objections to union support by allowing an employee to donate an amount equal to the amount of union dues to a mutually acceptable charity. *Ibid.*

App. 6a (quoting *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987)). The court found that, like the statute in *Larson*, Section 19 "facially discriminates among religions" and "creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute." *Ibid.* Accordingly, Section 19 "is subject to strict scrutiny and it 'must be invalidated unless it is justified by a compelling governmental interest' "; moreover, it "must be 'closely fitted' to further the compelling governmental interest." *Ibid.* (quoting *Larson*, 456 U.S. at 247, 251). The court concluded that, while the Board had offered "an explanation for the distinction" (*i.e.*, Congress drafted Section 19 narrowly in order to direct difficult inquiries concerning the religious nature of an objector's belief into a forum better equipped to deal with such issues, the federal courts), it did not "identify a compelling governmental interest served by the statute." Pet. App. 7a. Moreover, even if it were found that Section 19 served the "compelling governmental interest of protecting religious freedom in the workplace," it "could be more closely fitted to further this interest by paralleling the protection afforded by Title VII, which is without regard to membership in a particular religious organization." *Ibid.*

The court added that, although "application of the *Lemon* test is unnecessary to resolve the present case," Section 19 "would also fail to pass constitutional muster under that test." Pet. App. 7a. In the court's view, Section 19 "has a legitimate secular purpose of eliminating discrimination in employment practices" (*ibid.*), but fails the second and third prongs of the *Lemon* test. According to the court, Section 19 has the impermissible effect "of increasing the advantages of membership in the type of religious organization described in the statute. If an employee is a member of a [qualifying] religion * * * [he receives] the exemption afforded by Section 19, while employees * * * who are not

members * * * must resort to an action under * * * Title VII." Pet. App. 8a. Furthermore, because Section 19 requires the Board to determine if a religion is "bona fide" and has "historically held conscientious objections," it necessitates an inquiry that "borders on excessive entanglement with religion." *Ibid.*

The court rejected petitioner's request that it "simply discard the membership language of Section 19," stating that "courts cannot judicially redraft statutory language." Pet. App. 11a. Nor, in the court's view, was such revision permitted by Section 16 of the Act, 29 U.S.C. 166.[3] That Section "preserves other provisions of the [Act] when one provision is declared invalid," but does not "preserve the remainder of a provision when a portion thereof is invalidated." Pet. App. 11a. It "preserves the application of a provision to persons or circumstances other than those to which it was held invalid as applied," but "cannot save Section 19 because it is unconstitutional on its face." *Ibid.*

Accordingly, the court denied petitioner's request to set aside the Board's order dismissing the unfair labor practice complaint; it concluded that Section 19 violates the Establishment Clause and that Section 19 should be invalidated, rather than extended. Pet. App. 12a.[4]

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[3] Section 16, 29 U.S.C. 166, provides:

> If any provision of this [Act], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this [Act], or the application of such provision to persons or circumstances other than those as to which it is invalid, shall not be affected thereby.

[4] The court rejected petitioner's additional contention that Section 19, as construed by the Board, violates the Free Exercise Clause. The court noted that "to establish a violation of the free exercise clause an individual must first show that the government has placed a substantial burden on the practice of his religion." Pet. App. 12a. The court concluded that "Section 19 does not burden [petitioner's] practice of

ARGUMENT

The court of appeals correctly upheld the NLRB's determination that Section 19 extends only to members of certain religious groups that had historically held conscientious objection to supporting unions. The question whether Section 19, as so construed, violates the Establishment Clause presents a difficult question of constitutional law. We believe, however, that, in view of the unusual circumstances regarding petitioner's claim, this case presents a rare instance in which review is not warranted, even though the court of appeals concluded that a statutory provision is unconstitutional.

1. As the court of appeals correctly recognized, Section 19's plain language applies only to employees who are "member[s] of and adhere[ ] to" the tenets of a "bona fide religion" that has "historically held conscientious objections" to joining or financially supporting unions. Petitioner nevertheless suggests that the provision should be construed to apply to all employees with religious objections because the legislative history compels that conclusion. Pet. 10-16. Even if the legislative history supported petitioner's characterization, it could not overcome the clarity of the statutory text. Contrary to petitioner's contention, however, the legislative history of Section 19 confirms that the membership limitation was considered and intentional.

a. Section 19 was originally enacted as part of the National Labor Relations Act Amendments, 1974, Pub. L.

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his religion." Rather, "it requires employers to provide a substituted charity accommodation" to "members of religions having the beliefs described in the statute," while "nonmember employees having the same religious beliefs must file an action under Section 701(j) of Title VII to obtain an accommodation." Although it protects petitioner's religious beliefs, "the free exercise clause * * * does not mandate the accommodation offered by Section 19." Pet. App. 12a.

No. 93-360, § 3, 88 Stat. 397, and applied only to the health care industry. During consideration of the 1974 Amendments, the Senate rejected an amendment proposed by Senator Dominick that would have exempted from union dues obligations all employees with religious objections to support of unions, regardless of membership in a religious group that espoused such an objection. 120 Cong. Rec. 13,535-13,543 (1974); Staff of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Coverage of Non-profit Hospitals under the National Labor Relations Act, 1974*, at 70-71, 193-212 (Comm. Print 1974) (*Leg. Hist.*)[5] The legislative debate regarding Senator Dominick's amendment reveals congressional concern about the reach of such a religious objector exemption and about the propriety of thrusting the Board into such difficult constitutional questions. This concern was particularly pronounced in light of this Court's then-recent decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), extending the religious objector provisions of the selective service laws to those with moral, ethical, or religious objections occupying the place of religion in one's life.[6]

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[5] The Senate had earlier rejected an amendment proposed by Senator Ervin to exempt from the 1974 Amendments any hospital "owned, supported, controlled, or managed by a particular religion or by a particular religious corporation or association." 120 Cong. Rec. 12,950 (1974), *Leg. Hist.* 118-119; 120 Cong. Rec. 12,968, *Leg. Hist.* 141.

[6] See 120 Cong. Rec. 13,539 (1974), *Leg. Hist.* 203 (Sen. Taft) ("Would not the National Labor Relations Board be forced into some of the difficult and troublesome legal and practical questions that have faced the Selective Service Commission on this point? For example, the Supreme Court in *Welsh* v. *U.S.*, 398 U.S. 333 (1970), held that an individual could qualify as a conscientious objector if opposition to war stemmed not only from religious teachings, but also from deep-seated nonreligious teachings against war. Would not the same analogy apply with respect to the standards in the proposed amendment?");

Thereafter, Representative Erlenborn introduced a proposal in the House, limited to members of qualifying religious organizations who work for health care institutions. Representative Erlenborn stated that his amendment was "very narrowly drawn and would provide only that religious beliefs held by a person who is a member of a sect that has held these beliefs as a religious tenet will be able to ask for this waiver." 120 Cong. Rec. 16,902-16,903 (1974), *Leg. Hist.* 298. During the debate on the amendment, Representative Green noted that there were only seven religious groups with the requisite religious teachings. 120 Cong. Rec. 16,915, *Leg. Hist.* 334. Representative Erlenborn emphasized that his proposal was "more narrowly drawn than the conscientious objector provision of the military draft law and * * * would affect only a very small number of people because there are only a few religions that do hold this religious belief." 120 Cong. Rec. 16,914, *Leg. Hist.* 332. The Erlenborn amendment was agreed to in the House (120 Cong. Rec. 16,915-16,916, *Leg. Hist.* 336-337), and, with modifications not pertinent here, was acceded to by the Senate in the Conference and became the original Section 19. H.R. Rep. No. 1175, 93d Cong., 2d Sess. 3 (1974), *Leg. Hist.* 347; S. Rep. No. 988, 93d Cong., 2d Sess. 3 (1974), *Leg. Hist.* 347.

b. Petitioner acknowledges (Pet. 11-13) that Section 19, as originally enacted in 1974, applied only to members of religions with historical objections to supporting unions. Petitioner contends, however, that when Congress broadened Section 19 in 1980 by deleting the limitation on coverage to health care employees, the provision "underwent a radical change." Pet. 13. Petitioner is mistaken.

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120 Cong. Rec. 13,536, *Leg. Hist.* 195 (Sen. Williams) (the Board's determination "whether the employee is a bona fide religious objector * * * would not only be time-consuming, it would involve esoteric and highly sensitive interpretations.").

In 1980, Congress "amend[ed] Section 19 of the National Labor Relations Act by making the section apply to 'any employee' instead of just employees in the health care industry." H.R. Rep. No. 496, 96th Cong., 1st Sess. 3 (1979). See National Labor Relations Act Amendment, 1980, Pub. L. No. 96-593, 94 Stat. 3452. The pertinent language of Section 19, however, was not otherwise changed.[7] The legislation thus extended Section 19 to any member of "a bona fide religion which historically has held conscientious objection to joining or financially supporting a labor organization." H.R. Rep. No. 496, *supra*, at 2.[8]

The legislative history reveals congressional awareness and approval of the fact that Title VII of the Civil Rights Act, which prohibits religious discrimination by employers and unions (42 U.S.C. 2000e(j), 2000e-2(a), 2000e-2(c)), had been interpreted to apply to those objecting on religious

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[7] The 1980 amendment also added the last sentence to Section 19, see note 1, *supra*, providing that religious objectors could be charged if they used the union's grievance procedures. 94 Stat. 3452.

[8] Similar statements were made by supporters of the amendment. Representative Erlenborn explained that Section 19 addressed the needs of "individuals belonging to certain religions and sects who hold religious beliefs against joining or financially supporting labor organizations." 126 Cong. Rec. 2583 (1980). See also *id.* at 2580 (Rep. Thompson) (Section 19's "provisions would apply to any person who can produce adequate verification of membership in a bona fide religion that has historically held conscientious objections to joining or financially supporting a labor organization"); *ibid.* (Rep. Hinson) (Amendment applies to "any employee who is a member" and accommodates "the beliefs of certain religions which prohibit membership in or financial support of a labor organization"); *id.* at 2583 (Rep. Duncan) ("Anyone claiming this status must show membership"); *id.* at 2584 (Rep. Ashbrook) (1974 amendment applied "if any employee of a health care institution belonged to a religion or sect which historically held conscientious objection * * *. This bill expands those protections * * * to all employees, not just employees of health care institutions.").

grounds to union security agreements. See, *e.g.*, H.R. Rep. No. 496, *supra*, at 2; 126 Cong. Rec. 2581-2582 (1980) (Rep. Clausen); *id.* at 2584 (Rep. Erlenborn). Title VII and Section 19 thus would be "complementary" and would be "reconcile[d]" under the 1980 amendment. 126 Cong. Rec. 2582 (Rep. Clausen); H.R. Rep. No. 496, *supra*, at 2. The availability of Section 19, moreover, would avoid the necessity of repetitive litigation for established claims. 126 Cong. Rec. 2581 (Rep. Clausen); *id.* at 2584 (Rep. Erlenborn). As noted above, these observations were made in a context in which the membership limitation of Section 19 was repeatedly reiterated.

Thus, even if it is necessary to consult the legislative history – which, in view of the clarity of the statutory text, it is not – that history confirms that the membership limitation of Section 19 was intentional.[9]

c. Petitioner contends (Pet. 8), citing *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961) and *Communications Workers* v. *Beck*, 487 U.S. 735 (1988), that the Court has previously been willing to interpret the union security provisions of the labor laws in order to avoid constitutional problems and that it should avoid a constitutional problem here by deleting the membership requirement from

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[9] We note that, in 1987, the Department of Justice submitted an amicus brief to the Ninth Circuit, in a case concerning a union's claim that Section 19 limited the scope of Title VII, in which the United States argued that, if the court found it necessary to reach the issue, Section 19 should be construed to apply to all religious objectors. Gov't Amicus Br. at 19-23, filed in *International Ass'n of Machinists, Lodge 751* v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988). The government's amicus brief (at 20 n.9) noted that this aspect of Section 19 had not then been construed by the National Labor Relations Board. Upon further review of the pertinent legislative materials, and in light of the Board's subsequent construction of Section 19, we now conclude that the Board is correct in adhering to the plain meaning of the statutory text.

Section 19 and extending its coverage to individually held religious beliefs against giving financial support to unions. In *Beck*, however, the Court emphasized that it may not choose an interpretation " 'plainly contrary to the intent of Congress' " in order to avoid constitutional questions. 487 U.S. at 762. See also *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986) ("[T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication."). As shown, there is no basis for concluding that Congress intended coverage under Section 19 to extend beyond the designated religious groups.[10]

2. The constitutionality of Section 19 presents a difficult issue. Although a court of appeals' conclusion that a statutory provision is not constitutional is ordinarily a sufficient basis for this Court's review, we conclude that, in the unusual circumstances of this case, further review is not warranted.

At the outset, we note that there is a possible mootness question. It is well established that Title VII provides extensive protection to religious objectors, such as petitioner, whose religious objections to union security agreements

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[10] Petitioner's reliance on other decisions of this Court (Pet. 10) is similarly misplaced. In *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the Court found no "affirmative intention" that Congress intended to cover parochial school teachers under the National Labor Relations Act. 440 U.S. at 500-501, 504. Here the intention of Congress to limit Section 19 to certain religious groups is explicit. In *Welsh* v. *United States*, 398 U.S. 333 (1970), the Court construed the Selective Service Act religious conscientious objector provision to include personal beliefs; when Section 19 was initially enacted, in contrast, Representative Erlenborn specifically noted that Section 19 was more narrowly drawn than the military draft exemption. See page 9, *supra*. And, in *United States* v. *Rumely*, 345 U.S. 41, 47 (1953), the Court found that the Congressional Resolution at issue left open a "[c]hoice" as to the proper definition to be given the term "lobbying." Section 19 leaves no choice as to whether the limiting language may be read out of the provision.

are based on personal religious objections.[11] Here, after completion of the NLRB proceedings, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging the Union with religious discrimination.[12] Although the complaint was filed after the NLRB proceeding and is not part of the record of that proceeding, petitioner cited it as a related case on his court of appeals docketing sheet, and we bring it to the Court's attention because its disposition may raise a question of mootness.[13] In July 1990, the EEOC sent petitioner a reasonable cause letter.[14] Although petitioner never filed suit, the EEOC subsequently obtained the Union's formal agreement, in November 1990, to provide accommodation for any individual with religious objections to union security agreements, regardless of membership in a religious organization.[15] A question of mootness thus arises because peti-

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[11] See, *e.g.*, *International Ass'n of Machinists, Lodge 751* v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988); 29 C.F.R. 1605.2(d)(2) (EEOC Guidelines on Discrimination Because of Religion).

[12] In the court of appeals, petitioner stated that his EEOC complaint was filed because the Union had filed a separate lawsuit against the Company seeking his dismissal, a suit that was eventually dismissed upon agreement of the parties. See Petitioner's Letters to C.A., Sept. 11 & 18, 1990; see also NLRB Letter to C.A., Sept. 13, 1990.

[13] See *Board of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) ("[C]ounsel • • • have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation," and questions of possible mootness "should be called to the attention of the Court *without delay*"); *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

[14] Petitioner provided the NLRB with copies of his complaint and of the EEOC's reasonable cause letter.

[15] In a notice posted by the Union (and provided by the Union to the NLRB), the Union explained that the notice was posted as "part of the remedy agreed to pursuant to a conciliation agreement between"

tioner's employment was not terminated or otherwise suspended as a result of his objections; petitioner was not required to pay union dues; and the Union has entered into an agreement with a government agency committing itself to accommodate those, like petitioner, who have personal religious objections.

Despite these facts, we believe that petitioner's claim is not moot. Petitioner maintains that the Union's initial request that he be fired was an unfair labor practice. If petitioner were covered by Section 19, it would have been a violation of Section 8(b)(2) of the Act for the Union to "attempt to cause" the Company to discharge him for failure to pay dues because of a *bona fide* religious belief. See note 1, *supra*. In those circumstances, cessation of the unlawful conduct, or even compliance with a Board order, would not "render the case moot" or remove the basis for a Board cease-and-desist order if the Board decided that such an order was warranted. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); see also *NLRB* v. *Raytheon Corp.*, 398 U.S. 25, 27-28 (1970).

Nevertheless, although we do not believe that the case is moot, petitioner's claim of an actual and continuing injury is, in this context, quite thin and insubstantial. In our view, it is so thin that it is an inadequate basis for requiring this Court to resolve the constitutional questions presented. In other contexts, this Court has repeatedly stressed the need for prudence in the adjudication of con-

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the Union and the EEOC. The Union further announced, as part of that agreement, that it would "accommodate individuals in the collective bargaining unit with respect to sincerely held religious beliefs by not requesting their termination." The Union also advised that "[i]ndividual[s] affected by our conduct will be made whole for any losses they suffered as a result of the discrimination against them," and that "employees will not be discriminated against on the basis of their religion."

stitutional claims. See generally *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). With regard to this case, as a practical matter, very little now turns on the outcome of petitioner's constitutional claim.

Indeed, petitioner's claim is especially attenuated because, if petitioner were to prevail on his contention that Section 19 should be broadly construed and the case were remanded to the Board, it is likely that the Union would be willing to settle the Board case on the same terms that it reached with the EEOC and that the Board would accept that resolution of the dispute. Petitioner's claim is also attenuated because, even under the court of appeals' conclusion that the provision is unconstitutional, he is not entitled to the relief that he seeks (see Pet. App. 12a)—relief that is, in any event, essentially duplicative of relief already provided.[16]

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[16] We note that, in addition to the fact that petitioner has obtained substantial relief under Title VII, the availability of Title VII is critical to a correct understanding of Section 19. In our view, the court of appeals failed to properly appreciate its significance. Unlike *Larson* v. *Valente*, *supra*, this case does not concern a substantive difference in the imposition of a burden on different religious groups; rather, it involves differences in procedural mechanisms in the context of generally applicable protections for all religious objectors. The principal difference between Section 19 and Title VII is that Section 19 is enforceable through the National Labor Relations Act procedural machinery and the National Labor Relations Board, while Title VII is enforceable through the Civil Rights Act procedural machinery and litigation in the federal courts. As noted, in the congressional consideration of Section 19, concern was expressed about the Board's competence in addressing the difficult and sensitive constitutional issues of personal religious objections, and Section 19 is thus limited to those claims that are the most readily identifiable and verifiable. The substantive protections afforded by Section 19 and Title VII, however, are very similar. Both allow exemptions from union security agreements, and both permit substitute charity contributions in lieu of union contributions. See,

Further considerations also counsel against review. This is a case of first impression and, at least to this point, does not appear to be of recurring significance. Furthermore, there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject.[17]

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e.g., *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239, 1242-1243 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Although an "undue hardship" defense is available under Title VII, see 42 U.S.C. 2000e(j); *Tooley*, 648 F.2d at 1243-1244, courts have found that, with a substitute charity accommodation, exemptions from union security agreements based on religious objections did not present such an undue hardship. See, *e.g.*, *Nottelson* v. *Smith Steel Workers*, 643 F.2d 445, 451-452 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403, 406-407 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). (Different problems may be presented when an employee's religious objection is, not to unions as such, but to the particular activities of a particular union. See *EEOC* v. *University of Detroit*, 904 F.2d 331 (6th Cir. 1990)).

We also note that neither party below contended that Section 19 should be analyzed under the *Larson* v. *Valente* test, see Pet. App. 6a, and petitioner does not even cite *Larson* in his petition. Indeed, it is not clear that petitioner could appropriately rely on *Larson*. That case involved distinctions between sects; petitioner's claim does not rest on his membership in a sect that does not meet the requirement of Section 19 but rather on his personal religious beliefs. See Pet. App. 3a-4a. See also *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984) (describing *Larson* as a case "where there was substantial evidence of overt discrimination against a particular church").

[17] Although petitioner suggests that, if this case is not reviewed, the issue cannot arise in future judicial review of Board decisions (Pet. 7), this assertion is incorrect. The scope of Section 19 could arise, for instance, in an employer's defense to a union's charge that the employer improperly failed to discharge an employee with personal religious objections to a union security agreement; the Board would be required to respond to such a defense, and the Board's determination would be fully reviewable in the courts of appeals if the usual prerequisites for judicial review were satisfied. See also *Arvin Industries*, 285 N.L.R.B. 753, 757 (1987) (explaining that, in view of congressional intent and

Although these considerations would ordinarily not be an adequate basis for denying review of a court of appeals' determination that a statutory provision is unconstitutional, they support the conclusion that review is not warranted in this case, in which resolution of the constitutional issues will have very little effect on the resolution of the underlying dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Act's venue provisions, a single court of appeals decision does not necessarily bind Board in its implementation of nation-wide labor policy).